2009

# Chris Lippman v. Deemco Industries, LLC, Steven V. Deem, GP III Incorporated Reynolds Financial, LLC, SBS Business Consulting, Owen Salkin, Coldwell Banker Residential Brokerage Company, and John and Jane Does I-X : Reply Brief

Utah Court of Appeals


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IN THE COURT OF APPEALS IN AND FOR THE STATE OF UTAH

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| **Chris Lippman,**<br><br>**Plaintiff/Appellant,**<br><br>**vs.**<br><br>**Deemco Industries, LLC, Steven V. Deem, GP III Incorporated, Reynolds Financial, LLC, SBS Business Consulting, Owen Salkin, Coldwell Banker Residential Brokerage Company, and John and Jane Does I-X**<br><br>**Defendants/Appellees.** | **APPELLANT'S REPLY BRIEF**<br><br>**Appeal**<br><br>**Appellant's Case No. 20090537**<br><br>**2nd Dist. Ct. No. 060902994**<br><br>**Honorable Pamela G. Heffernan** |

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### I. THE PRECLUSION OF THE LIPPMAN'S EXPERT WITNESSES IS A SANCTION AND IS TANTAMOUNT TO A DISMISSAL AND DESERVES MORE CAREFUL CONSIDERATION BY THE COURT.

Coldwell Banker is right in stating that the trial court has been given great latitude in determining the most efficient and **fair** manner to conduct the court's business. Normandeau v. Hanson Equipment, Inc., P.3d 1, 7 (Utah App. 2007). Rule 37(f) of the Utah Rules of Civil Procedure states that:

> If a party fails to disclose a witness, document, or other material ... that party shall not be permitted to use the witness, document or other material at any hearing **unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.** In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).

URCP 37(f) (2209) (Emphasis added).

Unfortunately, the trial court and Coldwell Banker have rigidly adopted the efficiency of the case management and the exclusion of witnesses with fervor, while overlooking the fairness and exceptions to the rule. Both have chosen to gloss over the facts constituting exigency and good cause, and in the case of Coldwell Banker, Coldwell Banker has chosen to call the exigent circumstances "tales of woe" and "tall tales" without addressing whether or not such

circumstances are in fact good cause and exigent circumstances requiring the trial court to exercise discretion. A more reasoned approach would suggest that the burden of showing it is harmless or there is good cause must still be analyzed, but that the results of any sanction must be considered. Due process cannot be skirted by the label we apply to a sanction. Otherwise, we exalt form over substance.

### A. UTAH RULE OF CIVIL PROCEDURE 37(f) DOES NOT REQUIRE THE EXCLUSION OF LIPPMAN'S EXPERT REPORTS AND IT IS A SANCTION.

Coldwell Banker relies heavily on Posner v. Equity Title Ins. Agency, Inc., 2009 UT App 347. Ironically, Coldwell Banker was a party to this action as well. Coldwell Banker insists that the facts between the cases are "nearly identical." While the similarities are quite striking, it is the differences that are remarkable and compelling.

In Posner, Posner failed to disclose an expert witness in a timely manner. On appeal Posner argued that there was a tacit agreement between the parties to push the deadline for disclosure out past mediation. Id at ¶ 25. In that case, the trial court found that "no agreement to ignore the discovery deadline existed, and Posner had not otherwise shown good cause for his untimely filing." Id.

Unlike Posner, where the trial court considered the proffer that an agreement was made and made a factual determination that no agreement existed, this trial seemingly ignores Lippman's justification.

The trial court in denying the motion stated, "[c]laims stated premised on the need for expert testimony should be filed based on the expert consultation not the other way around." (R. 2442) Yet, in the motions for more time to disclose experts witnesses Lippman clearly pointed out the Court that they need time because one expert witness they had lined up, Brandon Wood, had backed out at the last minute. (R. 1886, 2382) Such a statement by the court, in light of specific facts by Lippman in his motion, puts in grave doubt as to whether the trial court even read the memorandum.

Such egregious oversights by the trial court and its failure to provide any factual analysis for not believing or otherwise ignoring Lippman's justification show no exercise of discretion on the part of the trial court.

In Posner, the trial court gave a reasoned factual basis for rejecting Posner's argument for good cause. In the present case, the court gave no factual or reasoned analysis for rejecting Lippman's good cause, but rather gave oddly strange justification that were incongruous with the facts presented to the trial court by motion, suggesting the perhaps the court did not even read the memoranda. Such oversights are unacceptable. Rule 37(f)

requires preclusion "unless the failure to disclose is harmless *or* the party shows good cause for the failure to disclose." So, while Rule 37(f) does require preclusion, it very clearly gives exceptions that the trial court either glossed over or ignored.

### B. THE TRIAL COURT'S EXCLUSION OF THE EXPERT WITNESSES WAS TANTAMOUNT TO DISMISSAL.

Coldwell Banker, once again, cites to Posner, to suggest that a discovery sanction is not tantamount to a dismissal and that trial court's action in Posner was an exclusionary sanction and not a dismissal. Rather it was the lack of a witness that led to the dismissal. Id. at ¶ 23, f.8.

Conversely, in that same footnote, this Court stated:

> Posner briefly alludes to a violation of his due process rights, claiming that the trial court dismissed his case as a sanction and thereby denied him his right to a jury trial. **However, Posner inadequately briefs this challenge.**

Id.

Two important points need to be made before briefly revisiting the Kilpatrick case. Lippman is not suggesting that this is a dismissal, but rather the results are tantamount to a dismissal and therefore, due process under a dismissal analysis must be carefully considered as analogous. Finally, Lippman has adequately briefed a due process claim and wishes to briefly revisit this claim again.

In Kilpatrick v. Bollough Abatement, Inc., 199 P.3d 957 (Utah 2008), the widow the decedent had her husband cremated after the trial court ordered that an autopsy be done upon his death. Ms. Kilpatrick out of grief and lapse in judgment cremated her husband without an autopsy. Id. at 966. The trial court dismissed.

The Supreme Court of this state cited the United States Supreme Court in holding that there was a constitutional limit on the dismissal of a case and a trial court cannot dismiss a case when failure to comply was "due to inability, and not to willfulness, bad faith, or any fault of the petitioner." Id citing Societe Internationale Pour Participation Inustrielles et Commericialeds, S.A. v. Rogers, 357 U.S. 197 (1958)

While the Utah Supreme Court and the United States Supreme Court were dealing with cases of dismissal, the Utah Supreme Court made it clear that they were concerned with the petitioner being "denied to a hearing on the merits of the case." Kilpatrick at 966.

While it is clear that a dismissal and an exclusion of necessary witnesses are in fact different on paper, the results are the same. Kilpatrick not only addresses dismissals but stands for the larger proposition of due process ensured by the U.S. Constitution.

A hypothetical extension of Kilpatrick serves to illuminate this point. The Utah Supreme Court reversed and remanded. Under instructions that a dismissal, based upon a discovery violation, was inappropriate because it violated due process, how well received would a discovery sanction short of dismissal but tantamount to a dismissal be received? Is this kind of semantic change acceptable? The trial court could just merely exclude any evidence of Mr. Kilpatrick's illness from trial, because no autopsy was performed and the same result would be achieved. Such a ruling would not be a dismissal but would be form over substance. This would allow trial courts to carefully package a ruling to skirt legitimate due process issues and claim that it was a lack of evidence that lost the case and not a dismissal. Due process should be protected regardless of how the violations are termed.

In the present case, no bodies were burned. No permanent damage was done to any evidence, as it was in Kilpatrick. Yet, the undisputed evidence presented in the motions by Lippman that he was unable to find a witness in time (inability according to the Supreme Court) were summarily cast aside or ignored by the trial court and called tale tales by Coldwell Banker.

Even if this Court does not want to fully adopt the stringent requirements of due process set forth in Kipatrick, the consideration or lack thereof by the trial court of the exigent circumstances and justification falls far short of any standard this Court has adopted or may adopt and will be addressed later.

## II. THE TRIAL COURT DID ABUSE ITS DISCRETION BY EXCLUDING LIPPMAN'S EXPERT WITNESSES.

Rule 37(f) provides that by rule, a court must exclude evidence when the evidence is not timely disclosed unless there is no harm or there is good cause shown. Coldwell Banker wants to beat the war drum that the experts were not submitted in a timely fashion and therefore should be excluded. Coldwell also argues that there is no evidence to support the claims of exigency. Finally, Coldwell Banker gets to the point and argues there is prejudice and no good cause, but without any actual showing of prejudice or explanation why there is no good cause shown.

### A. TIMELINESS IS NOT CONCLUSIVE IN THIS MATTER NOR HAS COLDWELL BANKER SUFFICIENTLY BRIEFED THIS ARGUMENT.

Coldwell Banker argues that the motion was not timely filed; and, therefore should be excluded. While admittedly the third motion was far after the motion discovery deadline, the lateness is excusable, not outcome determinative in this case, and not properly briefed by Coldwell Banker.

The first motion filed by Lippman was done after last minute notice was given that one report would not be done and the other witness would not be offering his expertise. Lippman mailed his motion on April 1 at the expiration of the order, but it was not received until April 3, 2009. Given the late notice such timing was excusable and until now has not been argued otherwise.

The third motion was understandably late, given the facts in this case. Of course Lippman missed the deadline. Perhaps the motion should have been couched as a motion to reconsider or better yet a motion to allow the designation of expert witnesses. Either way, the third motion was only responsive to the denial of the first motion, to add additional fact for the trial court and deal with the issue of "staleness." There is no way the third motion could be filed before the deadline.

It is interesting to note that in multiple cases the deadline was missed and the case was determined on the merits. Posner, is one such example. Posner missed the deadline for disclosing his witnesses and merely disclosed his expert two weeks late. Id at ¶24. The trial court did not refuse to hear the case on the merits nor did this Court, but rather determined by factual analysis that there was no justification and prejudice had resulted.

Coldwell admits that they did not oppose the first motion when it was filed and only objected to the date requested in the motion as stale. To now go back and reverse course is duplicitous. Given that this Court in Posner and the Utah Supreme Court in Dugan v. Jones, 615 P.2d 1239 (Utah 1980) (overturned on other grounds) entertained the merits of those case for late disclosure without a "timely motion" let alone a motion, speaks of the need to address this case on the merits rather than trying create technicalities without citing an legal authority for such an argument. This case should be heard regardless of whether motions were even filed.

Finally, the Utah Supreme Court stated in Valcarce v. Fitzgerald, 961 P.2d 305, 313, "[i]t is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief." This includes "no reference to legal authority in support of [their] contention." Coldwell Banker offers no legal authority or analysis for why this Court should deny Lippman his day before this Court due to filing dates.

### B. THE RECORD DOES HAVE EVIDENCE OF THE PROBLEMS THAT LIPPMAN HAD IN FINDING AN EXPERT.

Coldwell Banker, once again without any citation to authority, suggests that Lippman was required to provide a letter, affidavit, or some other type of competent evidence to support the claims that they were

struggling to line up expert witnesses. Coldwell even goes as far as to claim they are "tall tales."

Coldwell Banker never asked for a hearing or challenged the validity of the statements of counsel in these motions. Further, Coldwell Banker never explains why, in essence, those motions should be treated as motions for summary judgment requiring affidavits and evidence to support the proffers of counsel.

Coldwell Banker should not be allowed to come before this Court and for the first time assert more proof is needed without any rules requiring such. Coldwell Banker or the Court could have requested or required a hearing to allow counsel to come forward and proffer, or to provide letters or documentation in detail as to the efforts made to find experts and the last minute problems. Until now, neither the trial court nor counsel has asked for such. Instead, Coldwell Banker, for all intents and purposes, calls Lippman and his counsel liars and asks this court to ignore the undisputed proffers presented in the motions and a part of the record for this Court.

Finally, like the last argument, Coldwell Banker provides no law or meaningful analysis just accusations. Under Valcarce, this argument should be declined.

### C. THE LATE DESIGNATION IS NOT HARMFUL TO COLDWELL AND IT IS JUSTIFIED.

Coldwell finally addresses the merits of this case by arguing there is no good cause shown and that Coldwell has been prejudiced. Pursuant to Rule 37(f) and the applicable case law, if there is no harm or there is good cause shown, the trial court must exercise its discretion before excluding the evidence. Further, given the gravity of the results, care must be taken not to violate due process as earlier explained.

Neither the trial court in its ruling nor Coldwell Banker in its opposition to the designation of the expert witnesses have given any meaningful reasons why Coldwell Banker has been harmed other than general statements about delay in the trial and the costs to Coldwell Banker.

As to the delays in the case, this defies logic. Coldwell Banker comes in with unclean hands. As pointed out in the Appellants initial brief, Coldwell Banker had sat virtually idle for months in this case while Lippman vigorously pursued judgment against other parties and searched for an expert witness. After months of doing little or nothing, Coldwell Banker responds to the motion at hand by filing a memorandum in opposition and filing a request for a final pretrial conference. One must really wonder if Lippman had not designated his witnesses and asked the trial court to allow them, whether Coldwell Banker would still be doing next to nothing and

waiting as so many parties do in a defensive posture. Coldwell Banker wants to call Lippman disingenuous and full of false pretense, but at the same time can offer no explanation as to why they asked for a final pretrial when Lippman asked to disclose his witnesses as opposed to months before.

The trial court on the other hand, whether intentional or not, sat on the submitted motion in question here for two months, set a trial date, and then stated as a fundamental reason for denying the motion that a trial date had already been set. The trial date was set mere days before the decision was rendered and two months after the motion was submitted to the Court. All Lippman asked for was to disclose his witnesses and to give the other side some time to depose the witnesses if they chose. Such a limited request could have been granted and completed within those two months the court sat on both this motion and the pretrial request. No delays can be claimed. Even if there were to be minimal delays, there is no explanation as to how insignificant delays would prejudice Coldwell Banker's presentation of their case.

The only other prejudice claimed is one of financial costs. The trial court offers no explanation at all and Coldwell Banker offers very little.

Coldwell Banker asserts that they have made trial preparations based upon Lippman having no expert witnesses. Yet, Coldwell Banker was well

aware that Lippman intended to have experts as Lippman's first motion at the discovery deadline back in April of 2008 apprised Coldwell of Lippman's intentions nearly a year before Coldwell Banker filed a pretrial request. Coldwell Banker has shown that no additional expenses would have been incurred with a late disclosure.

This notion that it is cheaper to try the case without experts on one side is true but defies logic when applied to Rule 37(f). Any evidence under Rule 37(f) would be either prejudicial because it helps the side submitting the evidence and thus requires more work to defend it from the other side or it is irrelevant and not admissible anyway. With such a broad expansive interpretation of harm, as proposed by Coldwell Banker, this would render the harm portion of Rule 37(f) meaningless as it would apply to all cases. Somewhere a more detailed and explanation of harm should be given.

Even if this Court finds harm, good cause has been shown and undisputed. In the first motion for more time, Lippman was very specific in detailing to the Court who his experts were and why he needed more time and another expert. In the last motion, which is before this Court, Lippman not only expressed again why he needed an expert, but gave a brief but detailed explanation of the tremendous efforts that Lippman and his counsel went through to find a new expert and get his report ready to submit.

The trial court shrugs of the difficulty of finding an expert and Coldwell Banker scoffs at the idea and calls Lippman a liar. The reality is that Coldwell Banker chose experts from within house and has no idea how difficult it can be to find one expert commercial real estate agent let alone replace him when he chooses not to testify, when a party doesn't have in house experts at their beck and call.

Ultimately, the facts before this Court are that Lippman lost an expert witness and made tremendous and often fruitless efforts to replace that witness. Such a factually unopposed fact pattern is not only good cause but constitutes "inability" as espoused by the United States Supreme Court and echoed by the Utah Supreme Court. Kilpatrick at 966.

Finally, Coldwell Banker spends some time saying that the trial court's decision to punish Lippman for what happened to Deem is one of the factors the trial court considered. This is somewhat of a red herring. It is clearly something the trial court considered. Lippman's contention as already stated in his original brief is to indicate that such a factor and lack of other considerations showed an disturbing look by the trial court in the wrong direction.

Yes, the trial court had previously amended the scheduling order to compensate for withdrawal of counsel, but not for Lippman. Yes, Lippman

amended his pleadings to get the right Coldwell Banker because counsel for Salkin and later Coldwell Banker left it to Lippman to find the right broker. Lippman had to amend the pleadings to get the right broker.

In fact, as pointed out in the initial brief, the docket is full of consistent and meaningful effort by Lippman to prosecute this case.

Ultimately, the real problem Lippman has with the order is the trial court completely ignored Lippman's argument. As pointed out in the initial brief, it is evident that the trial court completely overlooked the exigent circumstances in a rush to deny Lippman's expert witnesses.

Finally, the decision in Boice v. Marble, 1999 UT 71 speaks volumes. In Boice, an expert witness withdrew shortly before trial and the other party complained of prejudice because there would not be sufficient time to depose the witness before the trial. The trial court denied the expert witness. The Utah Supreme Court in reversing that order spoke with a clarion call. The court stated:

> even if it were true that Marble could take the deposition of three witnesses before trial but not the new expert, the trial court could have obviated any prejudice granting a motion for a continuance. Rule 40 of the Utah Rules of Civil Procedure allows a court to postpone a trial 'upon good cause shown...' Given the unexpected nature of Newton's withdrawal, and considering all the other surrounding circumstances, we determine the trial court abused its discretion in excluding Boice's substitute expert witness

Boice at ¶ 11.

This case screams out, like Boice, we lost an expert and need to find a new one. This was pointed out long before a trial date was set. The Court sat on the submitted motion for two months and then set a trial date anyway. This case screams, like Boice, we have exigent circumstances and good cause shown. The trial court should have never ignored Lippman's plight. The trial court did not even need to grant a continuance of trial, as one was not even set. All the trial court had to do was read Lippman's motion recognize the good cause shown and deny Coldwell Banker's attempt to hurry and get this case set for trial.

When good cause is shown, trial courts must follow the guidance of Boice, and in the interest of justice and due process should make every effort to accommodate the party in need and were necessary obviate any prejudice. This is the problem that Lippman has with the trial court's order and Coldwell Banker's attempt to create its own prejudice and cram a trial date down Lippman's throat.

## III. LIPPMAN DID PROPERLY MARSHALL SUFFICIENT EVIDENCE TO CHALLENGE THE TRIAL COURT'S FACTUAL FINDING.

Coldwell Banker relies on various cases to argue that Lippman has the burden of marshalling the evidence that the trial court's factual finding is

incorrect. However, such a simplistic statement is overreaching in its meaning. First, the context of the cases is dealing with a presentation of evidence were facts are in dispute and the trial court has to weigh credibility. Second, what Lippman must is trying to show in disputing the ruling by the trial is right in the record and has been pointed to this Court in Lippman's initial brief.

The cases relied upon by Coldwell Banker assess the role of this Court when conflicting facts are presented to the trial court. A trial court's job is to "assess the credibility and to assign weight to conflicting evidence." Burton Lumber and Hardware Company v. Graham, 186 P.3d 1012, 1017 (UT App 2008). "The trial court is in the best position to weigh conflicting testimony, and assess credibility, and from this make a finding of facts." Fisher v. Fisher, 907 P.2d 1172, 1178 (UT App 1995).

It is axiomatic that a trial court sits with the best of advantage to see the presentation of evidence, to weigh the credibility of witnesses, and to try and find the truth among the varying stories.

In this case, there really are not facts, in the usual sense to marshal. Most of decision by the trial court states basic facts that are not contested, and the then berates Lippman for not already having an expert. A brief glance and the memoranda show otherwise. There is no dispute of fact or

judgment of credibility between witnesses here. The trial court either ignored Lippman's argument or implicitly called him a liar with no explanation of his or his counsels' credibility.

The trial court claims a trial date was set before this motion was decided. While this is true, the trial court conveniently ignores that this motion was submitted two months before the trial court set a court date based upon a pretrial request submitted with the memorandum in opposition to Lippman's motion. Technically, this is true. Intellectually, it is completely dishonest.

These are just two examples of the myriad of problems with the trial court's order that have already been addressed in the initial brief. Such anomalies supported by the record and such lack of consideration of proffered facts are what is being questioned.

There was no trial. The record is clear. The trial court has no better vantage point than this Court does as all suppositions as to what the facts are come from pleadings and the docket. This Court can readily assess the concerns as pointed out by Lippman without any deference to the trial court's judgment of conflicts of evidence and credibility as the dispute does not involve such allegations.

## CONCLUSION

In Boice, a case very similar to this one, the court stated:

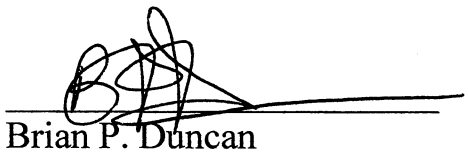
> [o]n occasion justice and fairness will require that a court allow a party to designate witnesses, conduct discovery, or otherwise perform tasks covered by a scheduling order after the court-imposed deadline for doing so has expired. We believe this case presents such a circumstance.

Id at ¶ 10.

Lippman believes such is the case again. The trial court ignored the good cause shown and the exigency in this case, when the facts are very similar to those in Boice. Further, the trial court claimed prejudice without substantiating this claim with any clarity. The trial court abused its discretion in excluding the disclosure of Lippman's experts and precluding his right to a fair trial.

DATED and SIGNED this 11 day of January, 2010

LEBARON & JENSEN, P.C.



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## CERTIFICATE OF DELIVERY

I hereby certify that I have mailed by U.S. Mail a true and correct copy of the foregoing, to the following:

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